



U.S. Citizenship
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Services

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FILE: [REDACTED]
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Office: NEBRASKA SERVICE CENTER

Date: AUG 31 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:
[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mark Johnson

S Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a research scientist at the Medical College of Ohio. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. [REDACTED] (November 29, 1991), states:

The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The petitioner states: "In the past 11 years, I have made very significant contributions to the fields of heart failure and cancer research." The petitioner asserts that she has "made substantially greater contributions than most . . . other researchers working in my field of endeavor." The petitioner describes her past and present research efforts. For instance, the petitioner states: "I also found tea could prevent oral cancer in a double-blind intervention trial in fifty-nine patients with oral mucosa leukoplakia using a mixed tea product developed by me. After the 6-month trial, the size of oral lesion was significantly decreased in the treatment group." The petitioner asserts that she was also "the first to discover the role of caveolae in signal-transducing function of cardiac Na/K-ATPase" and "that the caveolae of the blood vessels respond to digitalis drugs in a manner similar to those of the heart cells."

The petitioner submits several witness letters to support her petition, examples of which we discuss here. Four of the eight initial witnesses are on the faculty of the Medical College of Ohio; three others have supervised or collaborated with the petitioner. The most independent witness appears to be Professor [REDACTED] of Texas Tech University. Prof. [REDACTED] states:

Although I do not know [the petitioner] well on a personal level, I have followed her work professionally for a number of years and worked closely with her colleagues. . . .

[The petitioner] has performed seminal investigations on the molecular mechanisms that underlie the actions of digitalis and its derivatives, critical drugs used to treat congestive heart failure. It has been known for decades that the pharmacological target of these drugs is the Na,K-ATPase, an enzyme complex within the cell membrane that is essential for salt balance. The classical explanation for the actions of digitalis has been that it inhibits the Na,K-ATPase, and the resulting changes in salt homeostasis increase the strength of contraction in diseased heart muscle. [The petitioner's] work, however, has called into question that explanation, and it suggests instead that the role of the Na,K-ATPase may be far more complicated. Indeed, her research provides evidence that this enzyme complex plays a role in intracellular signaling, providing a means by which drugs such as digitalis can influence directly the expression of a variety of proteins. The implications of these studies for the treatment of heart failure are profound, and her results will almost certainly influence the manner in which we use existing drugs, as well as the logic employed in the development of new drugs.

Professor Julius C. Allen of Baylor University states:

[I]t was a common research interest that brought me in contact with [the petitioner], as she and her colleagues at the Medical College of Ohio had been doing exemplary work on a new exciting effect of cardiac glycosides in the heart.

[The petitioner] has already made extraordinary contributions since her arrival in Toledo. She has clarified the mechanism by which the very commonly used digitalis drugs send messages from the surface of the heart cells to the heart genes in the cell nucleus. . . .

[The petitioner] has also succeeded in proving that many of the above noted digitalis effects observed in isolated cardiac cells also occur in the intact heart[s] of experimental animals. . . .

Lastly, and most importantly she has provided the first solid scientific evidence that digitalis-induced events in the heart cells begin in small and specialized segments of the cell surface membrane called caveolae. . . . She has in fact shown that the caveolae of blood vessels responded to digitalis in a manner quite similar to those of cardiac cells. These important discoveries are in the process of being published.

I can honestly say that the work I have described above, performed by [the petitioner] has changed the way scientists view both cardiac cells and vascular smooth muscle cells. She has moved the biology of these important cardiovascular tissues into a new and exciting direction.

The petitioner states "Dr. [REDACTED] has never worked with me before," but the record contains proof of collaboration in the form of a published article which names both of them as authors.

Several other witnesses discuss this same work. The petitioner's supervisor, Professor [REDACTED] states that the petitioner's "unprecedented discoveries in our laboratory signify that almost no one else has her special and vital knowledge in this area, and no other researchers in this field possess such a highly skilled background." Some witnesses also cite the petitioner's earlier work on the use of tea extracts to prevent cancer. Professor [REDACTED] who supervised the petitioner's work at the Chinese Academy of Preventive Medicine, states that the petitioner's "data provided important proof that black tea can prevent cancer. This breakthrough finding has been recognized by the scientific community."

The director found that the record does not support witnesses' claims regarding the importance of the petitioner's work and her standing in the field. For instance, the director noted that the record does not support Dr. [REDACTED] assertion that the petitioner's work "provided important proof that black tea can prevent cancer." The director cited another article in the record which indicates that the studies "have not yielded clear conclusions concerning the protective effects of tea consumption against cancer formation in humans."

The petitioner's initial submission includes copies of the petitioner's published articles, but no citation records to establish the impact of those articles.

The director issued a detailed request for evidence. The director noted that the petitioner apparently had not performed cancer research since 1999, and asked whether the petitioner planned to resume this research. The director requested documentation of independent citations of the petitioner's published work, and additional evidence that would verify witnesses' claims that the petitioner's work has been influential in the field. The

director also requested background information to put some of the petitioner's initial evidence in perspective. In response, the petitioner submits new letters and evidence, as well as arguments from counsel.

The petitioner had initially stated: "It is estimated that about 70% of cancer is preventable by diet and nutrition related lifestyle changes." The petitioner did not specify by whom "it is estimated." The director requested a "documentary basis for this 70% figure from reputable cancer research organizations." In response, the petitioner submits materials relating to a report issued by the American Institute for Cancer Research and the World Cancer Research Fund. Counsel states: "Please note that this expert report states that diet may prevent 66-75% of cases of stomach cancer and may decrease the incidence of colorectal cancer by 66-75%." The petitioner's claim, however, referred not to "stomach cancer" or "colorectal cancer," but simply "cancer." The materials submitted in response to the notice state: "The panel estimates that recommended diets, together with maintenance of physical activity and appropriate body mass, can in time reduce cancer incidence by 30 – 40%." While this shows a link between diet and cancer in general, the percentage is only about half of what the petitioner had claimed "is estimated" by unknown sources (and even then this smaller percentage is not the result of diet alone). The report recommends "vegetables and fruits" to reduce cancer risk, but does not mention green tea or black tea (the objects of the petitioner's inquiry). We note that the petitioner's own cancer studies involved neither stomach cancer nor colorectal cancer; where the type of cancer is specified, the petitioner's work involved certain oral cancers and smoking-induced lung cancer.

Research involving tea and cancer prevention attracted some attention in the popular media in 1998; a CNN report identified the petitioner's supervisor but not the petitioner. As noted above, the petitioner had claimed: For instance, the petitioner states: "I also found tea could prevent oral cancer in a double-blind intervention trial in fifty-nine patients with oral mucosa leukoplakia using a mixed tea product developed by me. After the 6-month trial, the size of oral lesion was significantly decreased in the treatment group." Documents submitted in response to the director's notice confirm what the petitioner's wording implies: cancer was delayed, but not prevented, in the treatment group; the petitioner has not demonstrated that decreased lesion size equates to the absence or outright prevention of cancer.

Regarding the director's observation that the petitioner's recent work does not appear to have involved cancer research, counsel concedes that the petitioner "has not conducted cancer research since 1999." Counsel contends, however, that "[c]ancer and cardiovascular diseases are closely related. Both are age-related and share similar etiology." Counsel states: "Dr. [REDACTED] has asked [the petitioner] to continue the research on the relationship between Na/K-ATPase and human breast cancer," but a new letter from Dr. [REDACTED] does not support this assertion.

Counsel states: "Even though [the petitioner] has published only 3 papers, it must be pointed out that these 3 papers [appeared in] top-rated international scientific journals." Counsel cites the high impact factors of the journals that have carried the petitioner's work. Impact factors are calculated from the number of citations an average article in the journal receives; thus, the impact of individual articles determines the impact factor of a journal, rather than vice versa. Therefore, the impact factor of a journal does not show that any one given article from that journal has been heavily cited. For the impact of a particular article (rather than the overall impact of the journal in which it appears), we must look at the citation history of the article in question. If the individual article has few citations, then it is disingenuous to emphasize the impact factor of the journal; in such a case, the journal's impact factor is high in spite of, rather than because of, the article under discussion.

Several new witness letters accompany the petitioner's response to the director's request for evidence. For example, Professor [REDACTED] of Washington University, St. Louis, Missouri, states: "I have not

worked with the petitioner or know her on a personal level.” Prof. Mercer asserts that the petitioner’s “elucidation of this important role for the Na,K-ATPase . . . has redirected researchers in the field (myself included) to investigate the role of the Na,K-ATPase as a receptor for cellular signaling.” Prof. [REDACTED] is one of several witnesses who claim to have no close ties to the petitioner.

The director denied the petition, stating: “The evidence submitted does not distinguish the petitioner from other research associates to a substantial degree.” The director noted the inaccuracies (discussed above) in the descriptions of research involving tea and cancer prevention, and stated that the record contains no objective evidence to support the claim that the petitioner’s work has significantly affected the treatment of heart failure. The director also concluded that the petitioner had documented only two independent citations of her work as of the petition’s filing date.

On appeal, counsel states: “We believe that the evidences submitted show that there are four (4) citations by other independent research groups . . . in U.S., Australia, Denmark, and Japan. This evidence demonstrates that the impact of the Petitioner’s research work is not limited to the U.S. We believe that this evidence also distinguish[es] the Petitioner from other research associates to a substantial degree.” Because there exist citation indices and databases that track citations of published work, it is not a matter of “belief” as to whether or not an alien’s citation record separates that alien from others in the field. The petitioner has not shown that it is a relatively little-seen accomplishment for a researcher to have accumulated four independent citations more than five years after publishing her first article.

Counsel correctly asserts: “Whether a researcher has made significant impact in his/her field is not totally dependent on the number of citations. The number of citations is simply one of many indicators of a research[er]’s contributions to his/her field of endeavor.” This is a reasonable assertion, although we note it is counsel who claims, on appeal, that “four (4) citations . . . distinguish the Petitioner from other research associates to a substantial degree.” We place high value on independent citations because they provide objective documentation of other researchers’ reliance on a researcher’s work, and because they exist entirely independently of any immigration proceeding. Researchers cite the work of others because it is relevant to their work, not because an alien seeking benefits asked them to cite it. If the petitioner’s work has truly had a significant impact on the treatment of heart failure, it is not unreasonable to expect there to exist some kind of documentary evidence to that effect. Conspicuously absent from the record is evidence from hospitals or other medical centers, showing that the petitioner’s work has had an observable effect on the treatment of actual patients.

Counsel states that the director failed to give due consideration to grant documentation that identifies the petitioner as “key personnel” on a project funded by the National Institutes of Health. The director had observed that the petitioner was not named as “key personnel” until after the petition’s filing date. Counsel appears to dispute this finding, but then appears to concur with it, stating that the Grant Progress Report was filed “approximately 5 months” after the petition’s filing date, and that “[i]t normally takes a couple of months to prepare such [a] Grant Progress Report.” This does not show that the petitioner was already ranked as “key personnel” as of the filing date. Apart from all of this, the National Institute of Health funds tens of thousands of research projects each year,¹ each of which has its own “key personnel.” We are not persuaded

¹ According to the NIH web site at <http://www.grants.nih.gov/grants/award/trends/fund9404.htm> (accessed August 18, 2005), NIH awarded 47,464 research grants in fiscal year 2004, worth over \$19.6 billion. According to <http://www.grants.nih.gov/grants/award/awardtr.htm#c>, NIH provided funding to 3,181 different entities in fiscal year 2004. Over a hundred institutions received over 100 awards each. Johns Hopkins University alone received 1,304

that being one of perhaps a hundred thousand “key personnel” on NIH-funded projects (and one of dozens at the Medical College of Ohio) is *prima facie* grounds for a national interest waiver. If the waiver request is based on the petitioner’s status as “key personnel” on a project, the burden is on the petitioner to establish that the project is particularly important in comparison to other projects. Receipt of federal grant funding is not sufficient to establish that importance.

Counsel asserts that the director also “erred in failing to consider the Petitioner’s Awards, Peer Review work, and Professional Membership.” The petitioner received a “Science and Technology Achievement Award (Third Place)” in 1999. Counsel cites previously submitted statistics, and claims that these statistics show that only 103 out of “17,676 biomedical researchers in China” received that award in 1999. The 17,676 figure refers to “Health Researchers & Technicians,” with no differentiation between “researchers” and “technicians.” The record does not indicate whether all researchers were considered for the award, or if a smaller number applied for it. Furthermore, the “103 researchers” statistic refers to the “Research Awards of Ministry of Health,” “Grade III.” Nothing in the record indicates that these “Research Awards” and the “Science and Technology Achievement Award” are one and the same. The petitioner submits no statistics about the “Science and Technology Achievement Award (Third Place), and therefore our only clue to the rarity of the petitioner’s award is the certificate’s eight-digit serial number [REDACTED]. When discussing the failure of the evidence to correlate to claims regarding that evidence, we note that, on appeal, counsel does not address the director’s observation that the petitioner had not been “careful in making accurate presentations of the facts.”

Regarding the petitioner’s peer review and professional memberships, peer review appears to be an expected duty of competent researchers rather than a privilege extended to a relative few; and the petitioner’s membership in an organization with 65,000 members does not persuasively set her apart from others in the field.

Counsel is correct that a “major breakthrough” is not necessary for an alien to qualify for a national interest waiver, but at the same time it must be recognized that, by law, exceptional ability in the sciences is not sufficient grounds for the waiver. Therefore, it cannot suffice simply to show that the petitioner is productive, that her work has yielded useful results, or that she is exceptional. The national interest waiver is an added benefit above and beyond the visa classification sought, and therefore the alien must, in some way, persuasively demonstrate that she stands above professionals with advanced degrees and aliens of exceptional ability. Given the lack of statutory and regulatory guidelines, the evidence in each record must be considered on a case-by-case record rather than against any kind of fixed checklist or rigidly defined standards.

The record demonstrates that the petitioner has been a productive researcher, whose work has yielded worthwhile findings. Given the presence in the record of exaggerations and inaccuracies such as those already noted by the director, however, we cannot ignore that the objective, documentary evidence in the record does not fully support subjective assessments of the petitioner’s work. The petitioner is apparently no longer performing cancer research, and her more recent work involving digitalis drugs appears to have been at such an early stage at the time of filing that no definitive evidence exists to show its importance. As far as the petitioner’s discoveries being “unprecedented,” the lack of precedent appears to be intrinsic to the definition of “discovery.” Scientific researchers do not endeavor to discover that which is already known.

awards, totaling almost \$600 million. 1,132 of these awards were research grants, worth nearly \$541 million. The Medical College of Ohio, where the petitioner works, received 41 research grants, worth nearly \$13.5 million.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.